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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-578

FLOYD E. BURKHART,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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To the United States Court of Appeals for the Sixth Circuit

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on August 29, 1973, and reaffirmed October 14, 1974.

OPINIONS BELOW

The United States District Court rendered no formal opinion. The order of the United States Court of Appeals is attached as an Exhibit in the Appendix, including the denial of the petition for a rehearing.

JURISDICTION

The judgment of the Court of Apeals was entered on August 29, 1974, and reaffirmed October 14, 1974. The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

I. In a tax evasion trial, whether the trial Court deprived petitioner of due process of law, by allowing the Prosecutor to comment on the failure of the defendant's wife to testify in defendant's behalf?

II. In a tax evasion trial, whether the trial Court erred when the petit jury in its deliberations asked the following question: "If vote is 'not guilty', does the defendant have to pay his taxes and penalties?" and the District Judge, over defendant's objections, refused to answer the jury's question, but responded as follows: "The issues in this case to be studied and decided by the jury have been set forth in the Court's instructions. The question you have raised is not an issue in this case"?

III. In a tax evasion trial, was it error to allow the prosecution, without corroboration, to rely on an income item of $8,500.00 from farm subsidy payments reported on taxpayer's income tax return?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, 5th Amendment.

Internal Revenue Code 1954 Section 7201, 26 USC Section 7201.

STATEMENT OF FACTS

The petitioner, Floyd E. Burkhart, was indicted on April 12, 1973, on five counts of willfully and knowingly understating income taxes for the years 1966 through 1970 in violation of 26 USC Section 7201. A jury found him not guilty on counts 1, 2, 3 and 5, but convicted him on count 4, pertaining to 1969. The Government, in attempting to prove gross income for 1969, included $8,500.00 of farm subsidy

payments reported by taxpayer on his 1969 return. No corroboration of this item was offered.

Defendant argued that none of his own farm income had been unreported, and that he was operating in a joint venture with his mother who owned some of the farm land. Appellant's wife was privy to essential conversations related to the credibility of this defense, but was not called to testify since, as the record shows, she was in poor health after cancer surgery.

The prosecutor, in his summation, made these insistent comments to the jury concerning the appellant's wife's lack of testimony: ". . . but Doris Burkhart was there, too. And she could have testified as to exactly what happened . . ., she could have been called to the stand. Doris Burkhart was not called to the stand. Doris Burkhart did not give any testimony. Doris Burkhart, therefore, did not support the defendant's version. . . . You have to ask yourself why? Why was she not called to the stand?"

The jury, while deliberating, requested in writing that the District Judge answer this question: "If vote is 'not guilty', does the taxpayer have to pay his taxes and penalties?"

The District Judge conferred with counsel and at first indicated that he would advise the jury that a "not guilty" verdict would have no effect on defendant's civil liabilities.

The Government objected; the District Judge changed his mind, and wrote the following reply to the jury: "The issues in this case to be considered and decided by the jury have been set forth in the Court's instructions. The question you have raised is not an issue in this case".

Subsequently, the jury found the defendant guilty of tax evasion as to 1969 and not guilty as to the four other years involved.

REASONS FOR GRANTING WRIT

I. The issue presented, concerning the prosecution's comments to the jury on the lack of testimony by the defendant's wife, involves an important Constitutional right of the defendant's wife of refusal to testify, and the prosecutor's use of her exercise of this right to infer to the jury that her testimony would incriminate the defendant. This violates the principal enunciated in *Graves* v. *United States* 150 US 118 (1898) and *Griffin* v. *State of California* 380 US 609.

II. The second issue involves the right of the jury, to be advised as to the law when the jury was obviously confused as to the effect of a "not guilty" verdict; and the defendant's right to a fair trial, which necessarily includes his right to have the jury fully instructed as to the applicable law. The Court, in not directly answering the jury's question, thus deprived the defendant of his Constitutional right to a fair trial by depriving the jury of its right to make a fully informed judgment.

III. This issue involves the reliance of the prosecution on uncorroborated, extra-judicial admissions concerning the receipt of income. The lower Court's ruling is directly contrary to the ruling of this Court in *Smith* v. *United States* 348 US 147 and in *United States* v. *Calderon* 348 US 160, holding that uncorroborated extra-judicial admissions are insufficient for proof in a tax evasion offense.

For the reasons stated the Plaintiff respectfully prays that this petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

No. CR-73-211

UNITED STATES OF AMERICA,
Plaintiff,

v.

FLOYD E. BURKHART,
Defendant.

JUDGMENT AND COMMITMENT

(Filed November 30, 1973)

On this 29th day of November, 1973 came the attorney for the government and the defendant appeared in person and by John Kennedy Lynch, ccunsel.

IT IS ADJUDGED that the defendant upon his plea of Not Guilty and a verdict of GUILTY, has been convicted of the offense of filing a false and fraudulent income tax return, in violation of Title 26, Section 7201, U.S.C. as charged in Count 4, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN (10) days.

IT IS FURTHER ORDERED that the defendant is hereby fined the sum of THREE THOUSAND FIVE HUNDRED DOLLARS ($3,500.00).

IT IS FURTHER ORDERED that the execution of sentence is hereby stayed pending appeal.

IT IS ADJUDGED that

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ WILLAM K. THOMAS,
United States District Judge.

The Court recommends commitment to

....., Clerk.

(DULY CERTIFIED)

No. 74-1269

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FLOYD E. BURKHART,
Defendant-Appellant.

APPEAL from the United States District Court for the Northern District of Ohio, Eastern Division.

Decided and Filed August 29, 1974.

Before: PHILLIPS, Chief Circuit Judge, and CELEBREZZE and PECK, Circuit Judges.

CELEBREZZE, J., delivered the opinion of the Court, in which PHILLIPS, C. J., joined. PECK, J., (p. 13) filed a concurring opinion.

CELEBREZZE, Circuit Judge. Appellant Floyd E. Burkhart was indicted on April 12, 1973, on five counts of wilfully and knowingly understating income tax due for the years 1966 through 1970, in violation of 26 U.S.C. § 7201. A jury found him not guilty on counts I, II, II and V, but convicted him on count IV, pertaining to 1969. This is a direct appeal from his conviction and sentence of ten days' imprisonment and a $3500 fine.

The Government introduced items of unreported income from the operation of Appellant's farm in Bucyrus, Ohio. Evidence showed that for 1969 Appellant had reported taxable

income of $8,868.51, but had not reported other taxable income of $32,261.21, resulting in an omitted tax due of $12,222.31. There was evidence that Appellant knew at the time he filed his 1969 return that it incorrectly stated his income, and there was sufficient evidence for the jury to infer that the understatement had been wilful.

Appellant makes four objections on appeal.

First, Appellant claims that in order to prove its case the Government must establish not only that Appellant received certain unreported items of income but also that Appellant actually received the amount of income that he did report. Appellant's argument is that by not corroborating the receipt of income reported in his 1969 return, the Government failed to prove that Appellant actually received a substantial amount of farm subsidy income which Appellant reported on his 1969 return. If farm subsidy income was $0 in 1969, rather than the amount reported, Appellant argues, the unreported income would not substantially exceed the amount reported, so that there would be no understatement of income.

Appellant's superficially ingenious argument confuses the rule requiring corroboration of certain extra-judicial admissions[1] with the Government's burden in a tax evasion case. The Government must prove a substantial understatement of income. In so doing, it may take the taxpayer's reported income as an admitted amount earned from designated sources. If it can then show that considerable additional amounts were received but not reported, it has established a *prima facie* case of substantial understatement. *Cf. United States* v. *Campbell*, 351 F.2d 336, 339 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966); *United States* v. *Shavin*, 320 F.2d 308, 311 (7th Cir.), *cert. denied*, 375 U.S. 944 (1963); *United States* v. *Doyle*, 234 F.2d 788, 794 (7th Cir.), *cert. denied*, 352 U.S. 893 (1956);

[1] In *Smith* v. *United States*, 348 U.S. 147 (1954), and *United States* v. *Calderon*, 348 U.S. 160 (1954), the Government was required in net worth cases to corroborate oral and written statements made by the defendants relating to essential elements of the cases against them.

United States v. *Bender*, 218 F.2d 869, 872 (7th Cir.), *cert. denied*, 349 U.S. 920 (1955); *Schuermann* v. *United States*, 174 F.2d 397 (8th Cir.), *cert denied*, 338 U.S. 831, *reh. denied*, 338 U.S. 881 (1949). The Government need not corroborate the receipt of income which Appellant reported on his 1969 return.

Second, Appellant argues that he was deprived of a fair trial because the prosecutor commented on Appellant's failure to call his wife to the stand. Appellant had argued that some farm income had been unreported because he was operating the farm in a joint venture with his parents, who were entitled to the unreported income. Appellant's wife was privy to essential conversations bearing on the credibility of this defense, and in his closing argument the prosecutor asked the jury to disbelieve the joint venture defense, partly on the basis that Appellant had not called his wife to testify. Appellant did not object to this statement.

This circuit recently outlined the requirements for allowing a prosecutor to comment on a defendant's failure to produce certain witnesses. In *United States* v. *Blakemore*, 489 F.2d 193, 195 (6th Cir. 1973), we held that prosecutorial comment on failure to produce a witness was proper only where the witness' testimony would elucidate the transaction in question. Both conditions are satisfied here, because Appellant was in control of his wife's testimony and because her testimony would have elucidated the transactions which were the basis of Appellant's "joint venture" defense. Furthermore, in this case Appellant injected his wife's testimony into the dispute. He challenged the testimony of two Government witnesses by asking whether his wife had made statements to them which would undermine their claims. Yet, he failed to call his wife to the stand to verify what he claimed she had told the witnesses. Thus, Appellant attempted to use his wife's silence as implicit support for her statements, since the jury would assume that her testimony would support Appellant, and as

implicit refutation of the Government's witnesses. In such a circumstance, we must permit the Government to argue the contrary inference that Appellant's failure to call his wife to the stand meant that her testimony would have damaged him. *Cf. Himmelfarb* v. *United States,* 175 F.2d 924, 951 (9th Cir. 1949). Any marital privilege that may have existed was waived when Appellant introduced his wife's statements during cross-examination of the Government witnesses.

Third, Appellant argues that there was no proof of venue, an essential element of the case. But Appellant failed to object to venue until after the Government's case had been completed. The objection was thereby waived. *United States* v. *Fabric Garment Co.,* 262 F.2d 631 (2d Cir. 1958), *cert. denied,* 359 U.S. 939 (1959). Furthermore, venue may be proved circumstantially, and there was sufficient circumstantial evidence to show that the 1969 tax return had been prepared in the Northern District of Ohio, a proper basis for venue. *United States* v. *U.S. District Court,* 209 F.2d 575 (6th Cir. 1954).

Appellant's fourth objection relates to a communication between judge and jury. After deliberating for about an hour and a half, the jury sent a written note to the District Judge, stating, "If vote is *not guilty,* does the defendant have to pay his taxes and penalties?" The District Judge conferred with counsel and determined initially that he would answer that a not guilty verdict would have no effect on Appellant's civil liabilities for back taxes and civil penalties. The Government objected, arguing that this was not an issue in the case. The District Court agreed and wrote this response: "The issues in this case to be considered and decided by the jury have been set forth in the Court's instructions. The question you have raised is not in issue in this case."

Both sides agree on the legal relationship between civil and criminal tax proceedings. A not guilty verdict in a criminal case has no effect on the Government's ability to collect back taxes and penalties in a civil case. *Helvering* v. *Mitchell,* 303

U.S. 391 (1938); *Heindel* v. *United States*, 150 F.2d 493 (6th Cir. 1945). The matter of civil liability is not an issue when a jury is determining a defendant's criminal liability for tax evasion.

Appellant argues that the jury's question demonstrated that it believed Appellant was innocent but was unwilling to acquit him if it meant that Appellant would escape his tax liability. Another way to view the jury's question, however, is that the jury believed Appellant was guilty as charged but was willing to excuse him if it was assured that he would have to pay his back taxes.

Thus, the District Judge was faced with the problem of avoiding prejudice to Appellant out of jury concerns which were extraneous to a proper finding of guilt or innocence and of not encouraging the jury to acquit Appellant for similarly irrelevant reasons. Without stating a rigid rule,[2] we believe that the District Judge chose the proper course in this case. Rather than advise the jury about the legal effect of an acquital on Appellant's civil liability, he told the jurors that civil liability for back taxes was not an issue in the criminal case and that the jury should follow his instructions in determining Appellant's innocence or guilt. We cannot find error in this response.

By not advising the jury of an acquittal's effect on Appellant's civil obligations, the District Court re-emphasized the jury's obligation to uphold their oath – to follow the law in determining innocence or guilt. The jury was properly told to ignore everything but the facts presented and their legal charge in arriving at a verdict. As Mr. Justice Holmes wrote in *Horning* v. *District of Columbia*, 254 U.S. 135, 138 (1920):

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[2] If, for instance, a jury said, "We believe Defendant X is not guilty, but we want him to pay his back taxes. If we acquit him, will he escape his obligations?," the trial judge would be virtually forced to purge the trial of prejudice by telling the jury that their verdict would have no effect on the Government's ability to collect Defendant X's back taxes.

A standard cautionary statement might be that any civil obligations would be the subject of a separate proceeding.

> "[T]he jury has the power to bring in a verdict in the teeth of both law and facts. But the judge always has the right and duty to tell them what the law is upon this or that state of facts that may be found. . . ."

In our system of jury justice, the judge must state the law, though the jury is free to indulge in vagary and compromise once the case is sent to the jury room. *United States* v. *Dotterweich*, 320 U.S. 277, 279 (1943); *Dunn* v. *United States*, 284 U.S. 390, 394 (1932). Although the jury stands as a bulwark against laws which it deems unjust or excessively harsh, *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 18-19 (1955) *Duncan* v. *Louisiana*, 391 U.S. 145, 155, 157 (1965),[3] it is not the judge's place to advise the jury of the possible collateral effects of their decision, information that has nothing to do with the legal standards which they have sworn to apply.

We come to a final consideration. Even though the District Judge's instructions were correct and even though neither judge nor prosecutor injected an impermissible element into the case, a new trial would be necessary if we were convinced that the verdict was the direct result of a groundless fear that Appellant would escape his tax obligations unless the jury found him guilty. There is no significant indication that Appellant's conviction rests on such a prejudiced ground. "A mere suspicion . . . that the jury has not followed the court's instructions is not sufficient [for reversal], since that would

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[3] The present law of "jury nullification" (the jury's power to acquit a defendant out of a refusal to apply the law to facts clearly evidencing a criminal violation) seems not to require or permit a judge to tell the jury that it has the right to ignore the law as charged but to allow a defense attorney some leeway in persuading the jury to acquit out of considerations of mercy or obedience to a higher law. *See* Scheflin, "Jury Nullification: The Right to Say No," 45 So. Cal. L. Rev. 168 (1972); W. Forsyth, History of Trial by Jury 217-20 (2d ed. 1875); Kunstler, "Jury Nullification in Conscience Cases," 10 Va. J. Int'l L. 71 (1949); Note, "Toward Principles of Jury Equity," 83 Yale L.J. 1023 (1974).

Our approval of the District Judge's response is in line with the current standards on jury nullification, under which the judge attempts to persuade the jury to apply the legal standards he charges, to the exclusion of concerns beyond those standards.

make the verdict too vulnerable and would needlesly prolong litigation." 6A J. Moore 59-140 (1974). "That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters." *Dunn* v. *United States*, 284 U.S. 390, 394 (1932).

The judgment of the District Court is affirmed.

PECK, Circuit Judge (Concurring). I am in entire agreement with the disposition of the first three issues in the majority opinion, but have reservations concerning the fourth. In the circumstances I feel that the preferable course would have been for the trial judge to have made a direct response to the jury's question, but concur on the ground that it was not an abuse of discretion for him to decline to do so. It is unfortunate that the colloquy between court and counsel did not occur in the presence of the Court Reporter and that a verbatim record thereof is therefore not available for review.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 74-1269

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FLOYD E. BURKHART,
Defendant-Appellant.

ORDER

(Filed October 14, 1974)

Before: PHILLIPS, Chief Circuit Judge, and CELEBREZZE and PECK, Circuit Judges.

Appellant having filed a petition for rehearing with this Court, and this Court having considered said petition and being duly advised in the premises,

It is ORDERED that the petition for rehearing be, and it is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

CONSTITUTIONAL PROVISIONS

Amendment 5:

"No person shall be held to answer for a capital, or otherwise infamous crime, unles on a presentment or indictment of a grand jury, execpt in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

28 U.S.C. – SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.